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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 6

Secretary of Agriculture of the United States, Appellant,

v.

United States of America, Interstate Commerce Commission, Et Al.

No. 7

Utah Poultry & Farmers Cooperative, Armour and Company, and Swift & Company, Appellants,

v.

United States of America, Interstate Commerce Commission, Et Al.

No. 11

Secretary of Agriculture of the United States, Appellant,

v.

United States of America, Interstate Commerce Commission, Et Al.

No. 12

Utah Poultry & Farmers Cooperative, Armour and Company, and Swift & Company, Appellants,

v.

United States of America, Interstate Commerce Commission, Et Al.

On Appeal from the United States District Court for the District of Utah

BRIEF FOR INTERVENING RAILROADS, APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

BRIEF OF INTERVENING RAILROADS, APPELLEES.

OPINIONS BELOW.

The opinions in the District Court (R. 105-144) are reported as *Utah Poultry & Farmers Cooperative v. United States*, 119 F. Supp. 846. The majority opinion upholds a decision of the Interstate Commerce Commission (R. 11-52) which is reported as *Special Regulations, Eggs*, 284 I. C. C. 377.

JURISDICTION.

The opinion of the District Court dismissing this suit to set aside the order of the Interstate Commerce Commission is dated March 10, 1955 (R. 105, 148). Separate appeals (1) by the Secretary of Agriculture of the United States and (2) by Utah Poultry & Farmers Cooperative, Armour and Company, and Swift & Company were filed on May 7, 1954 (R. 150, 154). All were allowed on May 7, 1954 (R. 150-151, 155).

The final judgment of the District Court was entered on May 7, 1954 (R. 149). Separate appeals (1) by the Secretary of Agriculture of the United States, and (2) by Utah Poultry & Farmers Cooperative, Armour and Company, and Swift & Company were filed on June 8, 1954, and June 30, 1954 (R. 159, 163-164). They were allowed respectively on June 8 and June 30, 1954 (R. 160, 164-165).

Motions to affirm were filed by the Interstate Commerce Commission and by the intervening railroads in all appeals. Probable jurisdiction was noted on October 14, 1954, and all appeals were consolidated for argument (R. 1288).

Jurisdiction of the appeals is invoked under 28 U. S. C., Secs. 1253 and 2101(b).

QUESTIONS PRESENTED.

The Interstate Commerce Commission, after extended investigation and hearing in which it was established that it is humanly impossible to handle shell eggs without some breakage, approved the inclusion in the railroads' tariffs of provisions providing that no claims for damage to shell eggs shall be allowed where the damage does not exceed certain designated percentages, that where the damage exceeds those percentages claims shall be allowed in excess of those percentages if investigation develops carrier liability, but further providing that these designated percentages shall not apply whenever a shipper furnishes a federal or state egg inspection agency certificate showing the damage to be otherwise than the designated percentages, in which case the percentage of actual damage as shown on such certificate, plus one percent to cover damage in transit due to the inherent nature of shell eggs, shall be used. The questions presented are:

1. Whether the tariff provisions are just and reasonable regulations, within the administrative discretion of the Commission, to protect the railroads from being held liable for damage to shell eggs not caused by them, or limitations of liability which are prohibited by Section 20(11) of the Interstate Commerce Act.

2. Whether the Commission's order is supported by adequate findings and substantial evidence.

STATUTE INVOLVED.

The statute involved in the Interstate Commerce Act, Title 49 U. S. C. and particularly Secs. 1(6), 6(1), 13(2), 15(1), and 20(11) thereof. The text of these provisions is set out in Appendix A of this brief.

STATEMENT.

A. The Proceedings Before the Interstate Commerce Commission.

The Interstate Commerce Commission, by order dated July 23, 1948, upon its own motion, instituted an investigation into and concerning the reasonableness and otherwise lawfulness of the special regulations covering descriptions, marks, inspection and delivery, and the handling of claims thereunder, in connection with the transportation, in interstate or foreign commerce, of shell eggs from, to, and between points in the United States, with a view to making findings and prescribing reasonable rules, regulations, and practices relative to such transportation (R. 12). The Commission gave the investigation its Docket No. 30030 and entitled it *Special Regulations, Eggs* (R. 11).

The Commission held five hearings. During the course of the hearings the railroads published schedules containing new regulations but the Commission suspended their operation in its Investigation and Suspension Docket No. 5792 entitled *Damaged Tolerance on Shell Eggs.* That docket was heard and decided on a joint record with Docket No. 30030.

The dispute before the Commission centered around the railroads' contention that due to the fragility of shell eggs there is a normal expectancy of shell damage which exists at the time the eggs are delivered to and received by the railroads for transportation, and also that due to pre-existing shell damage and the inherently fragile nature of shell eggs, rather than to any railroad fault, there is a normal expectancy of damage which occurs during the course of transportation. The railroads submitted that there should be a provision in the tariffs relieving them from this normal expectancy of shell damage for which they are in no way responsible but which is due to the inherent nature of the commodity itself.

On February 4, 1952, the Commission handed down its decision which is reported as *Special Regulations, Eggs*, 284 I. C. C. 377 (R. 11-52). The Commission agreed with the railroads. It held that it would be reasonable to have provisions in the tariffs providing that on eggs placed in packages at rail point of origin no claim shall be allowed where the physical damage to the eggs at destination does not exceed 3 percent of the contents of the packages containing damaged eggs; that on eggs placed in packages at other than rail point of origin no claim shall be allowed where the damage does not exceed 5 percent; and that where damage exceeds 3 and 5 percent, respectively, claims shall be allowed in excess of those percentages, if investigation develops carrier liability. These tolerances do not apply wherever a shipper furnishes a federal or state inspection agency certificate showing point of origin shell damage to be other than 3 and 5 percent, respectively. In such cases the percentage of actual damage as shown on such certificates, plus 1 percent, to cover damage in transit due to the inherent nature of shell eggs, shall be used.

New schedules publishing regulations in conformity with the Commission's decision became effective May 2, 1952, after demands for their suspension had been denied by the Commission. A copy of the tariff setting forth the regulations (particularly Items 14586-A and 14587-A) appears in the record (R. 1286, A to C). For ready reference the regulations will be found in Appendix B of this brief. The effective date of this tariff is shown as April 18, 1952. Actually the regulations went into effect on May 2, 1952. The postponement was to give the Commission time to consider petitions for review which had been filed with it, and which it denied.

B. The Cause of the Commission's Investigation.

The Commission was led to inaugurate and to conduct its investigation *on its own motion* by reason of the tre-

mendous increase in claims for damage to shell eggs in recent years. Claims throughout the entire country increased from approximately $110,000 in 1941 to an all-time peak of $2,338,462 in 1947. Claim payments in the latter year were relatively greater for damage to eggs than to any other commodity. The shell egg carload traffic originated in 1947 was only 0.072 percent of all carload traffic, while the claim payments for damage to eggs constituted 1.91 percent of all claim payments (R. 38).

The claim payments on eggs in official territory (generally speaking, that portion of the United States north of the Ohio and Potomac Rivers from the eastern seaboard to the Mississippi River) were 2.32 percent in 1941, 7.02 percent in 1943, 16.16 percent in 1945 and 38.41 percent in 1947, of the aggregate revenue on this traffic. In the latter year the total claim payments in official territory amounted to $1,444,453 (R. 38).

The loss and damage per car and per $100 gross revenue on shipments of shell eggs, as compared with other commodities throughout the entire country in 1947 was as follows (R. 25):

Commodity	Loss and Damage	
	Per Car	Per $100 Revenue
Shell eggs	$83.72	$21.20
Melons	52.80	15.11
Sewer pipe, et cetera	19.57	13.16
Crockery and earthenware	29.20	9.10
Furniture (new)	10.23	4.38
Grain	3.45	1.42
Meats, fresh and cured	3.41	1.13
Plumbers' goods	14.06	4.35

Claims were filed on 58.6 percent of all carloads of shell eggs delivered at New York, Philadelphia, Baltimore and Boston during 1947. The percentage that such claims

were of the total revenue received on the shell egg traffic to those cities during the year mentioned was as follows:

New York	50.3
Philadelphia	11.7
Baltimore	15.8
Boston	12.2
Total	41.7 (R. 23).

C. The History of the Tariff Rules and Regulations.

Prior to July 24, 1948, the rules and regulations with respect to the handling of claims on shell eggs were those which became effective July 15, 1919, pursuant to the findings of the Interstate Commerce Commission in *National Poultry, Butter & Egg Asso.* v. *N. Y. C. R. R. Co.*, 52 I. C. C. 47, decided January 21, 1919. As originally published, no inspection of the contents of cases containing eggs was permitted at Boston, New York or Philadelphia when no cases showed external evidence of damage. At other points the so-called 20-case rule was in effect, which permitted consignees to lift the lids of 20 cases in the shipment and examine the top layers for damage. If damage to the contents was disclosed by such inspection, the rules permitted the examination of the top layers of all other cases selected by the consignee. All cases containing damaged eggs were then set aside for reconditioning. The 20-case rule became effective at Philadelphia on October 25, 1919, and at Boston and New York City on February 10, 1941 (R. 13).

The rules and regulations in effect before July 24, 1948, also provided that, except with respect to shipments of storage packed eggs, storage packed dirties, and rehandled and repacked eggs, no claim would be allowed if not more than 5 percent of the eggs was damaged. When the damage exceeded 5 percent the claims were allowed for all damage in excess thereof if the examination developed carrier liability. On shipments of storage

packed eggs, storage packed dirties, and rehandled or repacked eggs, claims for actual damage would be allowed where carrier liability could be established. No expense incurred by the consignee in the ascertainment of damage was allowed. In case of carrier liability, actual and necessary charges for labor and material in reconditioning the damaged cases, including the damaged contents, were borne by the carrier (R. 15, 43-45).

Under these regulations the carriers were paying large claims for damage to shipments of shell eggs. In the hope of bettering the situation, new regulations were published effective July 24, 1948, under which the descriptions "rehandled and repacked" and "storage packed eggs" were restricted to apply only to eggs rehandled and repacked, and graded and sorted, respectively, at packing plants or storage warehouses located at point of origin of the rail shipment (R. 15-16, 46-49).

These new schedules remained in effect until May 2, 1952, when the present schedules, approved by the Commission in *Special Regulations, Eggs, supra*, became effective (R. 15, 1286, A to C).

D. The Proceedings in the Court Below.

On January 20, 1953, Utah Poultry & Farmers Cooperative filed a complaint in the District Court for the District of Utah, Central Division, seeking a decree permanently suspending, enjoining, setting aside and annulling the order of the Interstate Commerce Commission of February 4, 1952, and a mandatory injunction directing the Commission to strike from its files the tariff publishing the rules and regulations in conformity with the Commission's opinion (R. 1-10). Motions for leave to Intervene were filed by Armour and Company on February 4, 1953 (R. 55), by the Secretary of Agriculture of the United States on February 26, 1953 (R. 58), and by Swift & Company on March 12, 1953 (R. 80). The motion of Armour and Company was granted on February 4, 1953 (R. 55-56),

and those of the Secretary of Agriculture and of Swift & Company on March 12, 1953 (R. 80-81). Intervening complaints were filed by Armour and Company, the Secretary of Agriculture, and Swift & Company on February 4, February 26, and March 12, 1953, respectively (R. 56-58, 60-65, 82-83). Answer was filed by the United States of America on March 13, 1953, admitting each and every allegation of the complaint (R. 84-87). Answers were filed by the Interstate Commerce Commission on March 16, 1953, praying the dismissal of the complaints (R. 87-90).

The railroads which are now appellees sought and were accorded permission to intervene on April 13, 1953 (R. 91-96). They filed an answer on the same date praying dismissal (R. 102-103).

In accordance with the requirement of Title 28 U. S. C., Sec. 2325, a three judge court was empaneled, and on March 10, 1954, the majority of the court (Pickett, Circuit Judge, and Ritter, District Judge) stated that judgment would be entered for the defendants, and on May 7, 1954, that was done and the complaints were dismissed (R. 105-149). The court held that "the method of removing from a damage claim filed on shell eggs that portion of the damage for which the railroads are not responsible is a practice over which the Interstate Commerce Commission is given jurisdiction in broad language," that the question before the court was "whether these carrier regulations which seek to avoid liability *for loss not caused by them* are reasonable," that "to determine the reasonableness of such a regulation requires the experience and knowledge of transportation conditions possessed by the Commission," and that "this is the kind of a question Congress intended the Commission to have authority to determine" (R. 125, 127). The court further held that "the liability which the carriers and Commission are forbidden by Section 20(11) to limit is a liability for damage caused by the carrier," that the regulations "purport only to exempt the carrier from losses the carrier

does not cause" and that they are not unlawful (R. 125, 127, 135). It further found that the findings of the Commission are supported by substantial evidence (R. 135). Insofar as the prayer to strike the tariff from the Commission's files was concerned, the court held that consideration of that question would be beyond its jurisdiction which was limited to enforce, enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission (R. 106).

SUMMARY OF ARGUMENT.

I.

There is shell damage in every shipment of shell eggs prior to its receipt by the railroads, and there is also unavoidable shell damage during transportation due solely to the fragile nature of shell eggs and to the previously existing rail damage. This damage is not caused by the railroads. They are not liable for it. The regulations eliminate from damage claims that portion for which the railroads are not responsible or liable. Such an exemption is not forbidden by law or by Section 20(11) of the Interstate Commerce Act. The tariff provisions are reasonable regulations with respect to the receipt of freight such as common carriers were permitted to establish at common law, and which the Interstate Commerce Act now provides it is the duty of the railroads to establish, and over which that Act gives the Interstate Commerce Commission express jurisdiction.

A. The evidence establishes that it is humanly impossible to handle shell eggs without some breakage, and that there is damage in every consignment of shell eggs at the time they are tendered to, and accepted by, the railroads for transportation. This was proved by studies submitted by witnesses from the United States Department of Agriculture and by the railroads. Analyses of

these studies amply support the tolerance of 3 percent in connection with eggs placed in packages at rail point of origin and 5 percent when placed in packages at other than rail point of origin. But no shipper need accept those tolerances. He may submit a federal or state inspection certificate showing the point of origin damage which will be accepted and used by the railroads in processing his claim. Section 20(11) does not prohibit the railroads from making reasonable rules and regulations designed to protect them from being held liable for such damage. The regulations are not an attempt to limit liability for damage caused by the railroads and are not unlawful.

B. The evidence establishes that eggs are fragile and that there is a certain amount of damage during transportation resulting solely because of their inherent nature and the pre-existing damage. Studies submitted by witnesses from the United States Department of Agriculture and by the railroads amply support the tolerance of 1 percent for such damage which the Commission approved. Regulations eliminating such damage from claims filed by shippers are not limitations of liability for damage caused by the railroads and are not forbidden by Section 20(11) of the Act. In order to be damage resulting from the fragile nature of the commodity it is not necessary that the damage would equally have occurred if the eggs had not been carried at all.

C. For the past forty years the Commission has asserted its administrative jurisdiction over tariff rules providing tolerances for losses which are not caused by the railroads. During that period the Interstate Commerce Act has contained a prohibition against limitations of liability such as the appellants here contend make the tolerances unlawful. Notwithstanding this circumstance, the Commission, in the face of the very contentions which are advanced here, has interpreted the Interstate Commerce Act as giving it authority over such tariff toler-

ance rules and has decided that where they are just and reasonable they are not unlawful. This settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. Moreover, since the first of the cases cited in which the Commission exercised its administrative jurisdiction, that portion of the Interstate Commerce Act, which is now designated as Section 20(11), was amended on seven occasions, and, while Congress must have been aware of the Commission's interpretation, it nevertheless saw no need to countermand that interpretation by amending that portion of Section 20(11) which the appellants here contend eliminates the Commission's jurisdiction. The repeated reenactment of the statute, without change in the portion thereof in question, is persuasive of a legislative recognition and approval of the construction which the Commission has followed.

II.

Loss and damage claims involving shell eggs have been a problem for almost half a century. Tariff rules and regulations involving such claims came before the Commission in *New York Mercantile Exchange* v. *B. & O. R. R. Co.*, 36 I. C. C. 156, decided October 4, 1915, *National Poultry, Butter & Egg Asso.* v. *N. Y. C. R. R. Co.*, 52 I. C. C. 47, decided January 21, 1919, and finally the present case, *Special Regulations, Eggs*, 284 I. C. C. 377. The proceedings in question show there was and is no possibility of resolving the difficulty as though it were a mathematical problem to which there could be only one answer. It is one which calls for the exercise of an informed judgment. It is the kind of question which Congress intended the Interstate Commerce Commission to have authority to determine. To interpret Section 20(11) of the Act as the appellants contend would render impotent the other provisions of the Act which forbid unjust discrimination, undue preference and prejudice,

and departure from the ultimate collection of the full tariff charges. Moreover, it is a rule of statutory construction that statutes should be interpreted so as to harmonize conflicting or inconsistent provisions so as to enable all of them to contribute in proper degree to the object sought to be accomplished. In the present situation the interpretation placed upon the provisions of Section 20(11) by the appellees would avoid unjust discrimination, undue preference and prejudice, the making of involuntary rebates, and a multiplicity of suits. It would further the purpose of the Act.

The appellants' contention that the Commission's report and order are unjust and unreasonable and are not supported by adequate findings and substantial evidence is actually an attack upon the judgment of the Commission. The record contains abundant evidence to substantiate the necessary findings of the Commission and those findings have been made. Since the record as a whole adequately supports the Commission, the Commission's judgment is conclusive.

ARGUMENT

The tariff provisions under consideration provide that on eggs placed in packages at rail point of origin no claim shall be allowed where the physical damage to the eggs at destination does not exceed 3 percent of the contents of the packages containing damaged eggs; that on eggs placed in packages at other than rail point of origin no claim shall be allowed where the damage does not exceed 5 percent; and that where damage exceeds 3 and 5 percent, respectively, claim shall be allowed in excess of those percentages, if investigation develops carrier liability. However, no shipper is compelled to accept these tolerances. The shippers are afforded an opportunity to have the exact amount of point of origin damage determined

and used. The regulations afford the shipper an opportunity of presenting an inspection certificate of federal or state inspection agencies showing the extent of the physical damage to the eggs determined at the rail point of origin of the shipment immediately prior to tender for rail transportation. To the damage shown in such certificate is added 1 percent for further damage in transit due to the inherent nature of the eggs, and the total thus computed is deducted from the claim against the railroad for damages found to exist at destination for which the railroad might be liable (R. 52, 53, 54; 1286 B and C).

The necessity for the regulations rose out of the fact that there is shell damage in shipments of eggs prior to their receipt by the railroads, and the further fact that there is unavoidable shell damage during transportation due to the fragile nature of shell eggs and to the previously existing damage. These points are conclusively established by the record.

The problem presented to the railroads, and later to the Commission, was how to eliminate from a damage claim on a shipment of eggs that portion which was in the consignment when the shipper tendered it for transportation and that which accrued during transportation due to the inherent nature of the commodity. It was necessary that something should be done to protect the railroads from being held liable for such damage.

Since the basic attack upon the Commission's approval of the regulations is predicated upon Section 20(11) of the Interstate Commerce Act, a brief preliminary summary of it is also appropriate. It provides that any railroad shall be liable to the lawful holder of the bill of lading "for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States, or within an adjacent foreign country when transported on a through bill of lading,

and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * *." The prohibition against exemption is against loss, damage or injury to the property *"caused by it"*, the common carrier, and does not prohibit such exemption where the loss, damage or injury is not caused by the common carrier. This interpretation is in accordance with the adjudicated cases. Section 20(11) was originally enacted in 1906 (34 Stat. 593). After amendment in 1915, it was interpreted by the Interstate Commerce Commission in *The Cummins Amendment*, 33 I. C. C. 682. In that report the Commission stated at page 695:

> "A carrier, after the Cummins amendment goes into effect, may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or a tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not cause."

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, this court in interpreting the statute said:

"What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it.' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' *The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common law duty as a common carrier*" (506-507). (Italics inserted.)

The common law rule with respect to a common carrier's liability is set forth in *Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, where the court said at page 422 "that a carrier is liable for a failure to transport safely goods entrusted to its care unless the loss or damage was due to one of the specified causes," which it enumerated at page 421 as "the act of God, the public enemy, or the act of the shipper, or the nature of the goods themselves." However, the common law did not prohibit a shipper and a carrier from entering into an agreement restricting and qualifying this responsibility. In this connection this court said at page 113 in *York Co.* v. *Central Railroad*, 3 Wallace 107, 70 U. S. 107, that "when such stipulation is made, and it does not cover loss from negligence or misconduct we can perceive no just reason for refusing its recognition and enforcement." More recently, in *San Giorgio I* v. *Rheinstrom Co.*, 294 U. S. 494, this court said at page 496 that "the carrier may exempt himself by contract

from liability for the consequences of events beyond his control." Thus the conclusion in the *Croninger case* is in conformity with the common law.

The railroads submit that the provisions of Section 20(11) are not controlling here. One of the rights conferred upon a common carrier at common law was to establish reasonable rules and regulations governing the conduct of its business. This common law right has been held to be particularly applicable to the receipt of freight. This is epitomized in *Platt* v. *Lecocq*, 158 F. 723 at pages 730-731, in the following language:

> "A common carrier has the right to conduct its business in its own way in accordance with the rules of the common and statutory law. It is bound to receive and to transport goods of the character which it offers to carry at reasonable times and places, but at no other times or places. It has the right to make and enforce reasonable regulations which may lawfully fix the times, the places, the methods, and the forms in which it will receive the various commodities it undertakes to carry, and the rules which it thus adopts are presumptively right and reasonable. The burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them. Harp *v.* Choctaw, O. & G. R. Co., 61 C. C. A. 405, 410, 125 Fed. 445, 450; Lake Shore & Mich. Southern Ry. Co. *v.* Smith, 173 U. S. 684, 691, 19 Sup. Ct. 565, 43 L. Ed. 858; Harp *v.* Choctaw, O. & G. Ry. Co. (C. C.) 118 Fed. 169."

To the same effect is *United States* v. *Oregon R. & Navigation Co.*, 159 F. 975, 979, and *York Co.* v. *Central Railroad, supra,* in which last mentioned case the court said at page 112 that "he [the common carrier] * * * may prescribe regulations to protect himself against imposition and fraud, * * *."

By virtue of Section 1(6) of the Interstate Commerce Act, it is made the duty of railroads to establish just and reasonable regulations and practices affecting the method of presenting and delivering property for transportation. This duty is set forth in the act as follows:

> "It is hereby made the duty of all common carriers * * * to establish, observe, and enforce just and reasonable regulations and practices affecting * * * the manner and method of presenting, marking, packing, and delivering property for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property * * * which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable * * * regulation, and practice is prohibited and declared to be unlawful."

Section 2 prohibits unjust discrimination and Section 3 undue preference and prejudice.

Section 6(1) of the Interstate Commerce Act requires that such rules and regulations as "in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee" must be published in the carriers' tariffs, and Section 6(7) provides that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified."

Section 15(1) of the Interstate Commerce Act confers upon the Interstate Commerce Commission the authority to adjudicate the lawfulness of regulations and practices established by the carriers and this includes not only those regulations which must be published in the tariffs, but as well those which are not so required to be published. The pertinent language is as follows:

"That whenever, * * * after full hearing under an order for investigation a hearing made by the Commission on its own initiative * * * the Commission shall be of opinion * * * that any * * * regulation, or practice whatsoever of such carrier or carriers * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe * * * what * * * regulation or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist * * * and shall conform to and observe the regulation or practice so prescribed."

Thus, the Interstate Commerce Commission has been given jurisdiction over the rules, regulations and practices of the railroads in a broad, clear and unambiguous manner. The tariff provisions here are within that jurisdiction. They are rules, regulations and practices necessary in connection with the receipt and transportation of freight. They assist in the elimination of unjust discrimination and prejudice.

I.

SECTION 20(11) OF THE INTERSTATE COMMERCE ACT IS NOT A BAR TO THE ACTION OF THE COMMISSION IN THIS PROCEEDING.

A. Section 20(11) Has No Application to Damage Existing in Consignments Prior to Their Receipt for Transportation.

It is axiomatic that a common carrier is not liable for damage in a consignment which occurred prior to its

tender and acceptance for transportation. There is always a certain amount of such damage in a consignment of shell eggs. This is conclusively established by the record. The evidence shows that it is humanly impossible to handle shell eggs without some breakage (R. 262, 342, 343, 346). Positive statements to this effect came from the witnesses from the United States Department of Agriculture, appellant here.

Mr. Henry G. F. Hamann, Chief of the Dairy and Poultry Inspection and Grading Division, Production and Marketing Administration, United States Department of Agriculture, was placed upon the stand by the attorney for the United States Department of Agriculture, and, at page 342 of the record, testified as follows:

"COMMR. MITCHELL:—Mr. Hamann, I notice in your Exhibit No. 20, as I read this, your department provides for tolerance permitted in these grade AA eggs of 7.5, is that right?

"THE WITNESS:—That is correct, sir.

"COMMR. MITCHELL:—That includes checks?

"THE WITNESS:—Yes, sir, that includes all tolerances, all tolerance for edible eggs.

"COMMR. MITCHELL:—And on grade A, you permit 11.7 per cent?

"THE WITNESS:—Yes, sir.

"COMMR. MITCHELL:—So you do recognize that there must be a tolerance in the grading of eggs?

"THE WITNESS:—There is a tolerance in the grading of eggs, sir, because it is not humanly possible to remove from any lot of eggs in the candling or grading process all defective eggs.

"COMMR. MITCHELL:—Does that include also cracked eggs?

"THE WITNESS: Yes, sir.

"COMMR. MITCHELL:—You say, then, it isn't humanly possible to eliminate all the cracked eggs that you would find in cases?

"THE WITNESS:—That is correct.

"COMMR. MITCHELL:—All right.

"THE WITNESS:—The tolerances are set up primarily for the purposes of making allowances for human error."

Further, on page 343, the following colloquy took place between Mr. Hamann and his counsel:

"Q. You say that is impossible to eliminate every checked and cracked egg from a case in the process of grading and inspection of eggs?

"A. Yes, sir."

And still further at page 346 of the record Mr. Hamann testified:

"Q. You pointed out it was humanly impossible, or at least impractical, to pack a perfect car. You have never seen a perfect car, have you?

"A. No, sir, I haven't.

"Q. Then there is a normal expectancy of shell damage in every car that is loaded, is there not?

"A. Yes, sir."

The impossibility of having a case of eggs without some breakage was further emphasized by this Department of Agriculture witness by the following which was also taken from his direct examination and which appears at page 343 of the record:

"Q. Suppose you get a car of eggs in bad order in New York. As I understand it, some of the cases may be broken, and you take the good eggs out of two or three cases, and you make one case of good eggs. That is, if your damage is that extensive. Now, by reconditioned case, I mean the case which results, the case of supposedly good eggs. In that case, are all the eggs 100 per cent sound?

"A. They can't be because it is humanly impossible to do it.

"Q. Would you expect to find in that case of eggs the same number or more of checked and cracked eggs than was found in the original case packed back in the country?

"A. I would expect to find about an equivalent number, everything else being equal."

Another witness placed upon the stand by the attorney for the United States Department of Agriculture was Mr. Hermon I. Miller, Chief of Research Division of the Poultry Branch, Production and Marketing Administration, United States Department of Agriculture (R. 361). He made studies with respect to damage to shell eggs at the request of the Interstate Commerce Commission (R. 369). Mr. Miller stated that when eggs from the farm are delivered to the packer 5 percent of them are in a checked condition (shell cracked, but membrane unbroken) upon arrival at the packing plant. Of this 4 percent existed at the time the eggs left the farm, but 1 percent more became checked while traveling to the packer's plant (R. 365, 371, 472-473). In addition to the 5 percent of the eggs which were in a checked condition, 12 percent more also showed shell damage consisting of stains and dirties (R. 371). The witness stated that the eggs are reworked at the packer's plant and that when they left the shipping point the eggs showed 1.9 percent checks and 1.4 percent stains and dirties, a total of 3.3 percent (R. 371). This testimony was given by Mr. Miller at the hearing in Chicago on July 27, 1949. After further tests he corroborated it at a subsequent hearing which was held at Brooklyn, N. Y., on December 15, 1949, his testimony, which appears at pages 471 and 472 of the record with respect to this point, being as follows:

"Q. At the Chicago hearing you presented exhibits Nos. 22 and 23 and you indicated at page 294

of the record that, 'We have some other material for 1948 that we haven't got summarized yet that we will throw into this when we get it completed.'

"Have you made some subsequent checks, since the Chicago hearing?

"A. Yes, Mr. Matson. That was with regard to the amount or the type of egg that was going into cases in midwestern shipping points and the type coming out at destination, and we have examined the complete records and our testimony will stand as presented in Chicago.

"Q. As I recall that testimony, at pages 269 to 298 of the transcript, you found that there were packed into the cases at origins 1.9 percent checks?

"A. That is right.

"Q. And 1.4 percent stains and dirties. Do your subsequent tests that you have run on this material and other material bear you out in those figures?

"A. They do."

The study in which this witness of the Department of Agriculture expressed confidence was described by him at page 363 of the record as follows:

> "The third source of material consists of data on 115 cars secured by our own staff members in 1948 and 1949. In these records we made careful inspections of eggs at points of origin as they were to be loaded into railway cars, marked the sample cases inspected at this point, and re-inspected these same cases and the same eggs at destination. This exhibit should typify the average quality and condition of eggs that are packed in railroad cars for shipment from midwestern points."

The result of the study described in the above quotation is set forth at page 3 of Exhibit No. 22 (R. 1130), and shows the shell damage prior to rail shipment as follows:

Stains and dirties	1.4
Checks	1.9
Loss	0.1
Total	3.4

The reason for the confidence which the Department of Agriculture representative had in the above figures is stated by him at page 364 of the record, as follows:

> "Now, I have more faith in those figures than I would have otherwise because if you look in the middle page between these two tables you find the report on the 737 cars selected at random from the inspection and grading reports, and I think you will agree that to a considerable extent the total or average column for origin and grading reported on this page agree with t origin grading for the 115 cars. That gives me confidence to a certain extent that the figures on the 115 cars are rather representative."

The study with respect to the 737 cars, to which the Department of Agriculture witness referred covers eggs from all parts of the country (R. 370). It appears at page 2 of Exhibit No. 22 (R. 1129) and contains the following breakdown:

Stains and dirties	1.8
Checks	1.9
Loss	0.2
Total	3.9

Mr. Hamann, the aforementioned Chief of the Dairy and Poultry Inspection and Grading Division, Production and Marketing Administration, of the United States Department of Agriculture, stated that approximately 10 percent of the total volume of commercial eggs produced throughout the nation are graded by the Department (R.

329, 331), and that the certificates issued by the Department at the time of the grading show that there is a normal expectancy of shell damage at origin (R. 346).

An examination was made by the railroads of 1,002 origin inspection certificates of the Department of Agriculture which revealed that 18,437 cases of eggs were included in the 1,002 cars examined at shipping point with the following results:

3.04 percent of the natural eggs (eggs before oil dipping) were found to be checked and/or stained.

3.22 percent of the processed eggs were found to be checked and/or stained (R. 240).

The railroads' study of the Department of Agriculture certificates which developed that 3.22 percent of eggs shipped have shell damage at origin is a remarkable substantiation of the study made by the Department of Agriculture in response to the request by the Commission.

The railroads also submitted the results of studies of inspections made by them at rail shipping points (R. 240). These studies showed that there is shell damage of one kind or other in every car regardless of whether or not the eggs had just been rehandled and repacked or had been hauled over the highways various distances before loading into the rail freight car. The result of this research is summed up as follows:

From	Year	No. of Cars	Percentage Damage
Indiana	1947	74	2.2
"	1948	30	3.2
"	12/4/48 to 2/19/49	22	2.8
Iowa	1947		2.57
"	1948		2.46
Minnesota	1947		1.81
"	1948		3.84

The results of another railroad study made at shipping point appears at page 302 of the record as follows:

> "We adopted a program of taking 15 cases and inspecting 100 eggs to determine how many eggs were checked, broken, stained and dirty. The statement shows that we made inspection on 60 cars and we developed through that process that we used 2,256 checks, 98 broken, or a percentage of 2.61."

Shipping point studies made by railroad representatives indicate that shell damage before rail transportation is chargeable to the following factors in the order of their importance, not one of which is attributable to the railroads: *First*, the inherently fragile nature of eggs. It is generally conceded by all parties acquainted with the commercial handling of eggs that a certain amount of shell damage is inescapable. This normal expectancy of damage starts at the nest and, depending upon the strength of the individual shell, continues progessively until the egg is used by the consumer. *Second*, the handling of the eggs in the candling and repacking operations. Checks (cracked eggs with unbroken membrane) develop in any oil-dip processing of the eggs, and eggs are broken when the egg case is lidded. *Third*, the handling by the shippers of the packed egg cases to and into the freight car. Very often there is no supervision of the handling of the packed cases in the car. Sometimes unskilled or itinerant labor, with apparently no previous training, is used by the shippers to load the cars, and with no supervision on the part of the owner of the eggs in promoting careful and proper loading (R. 241).

It is axiomatic that damage existing in a consignment at the time it is tendered for transportation is not caused by the railroads and that the railroads are not liable for it. The regulations afford the shipper the opportunity of submitting a federal or state inspection certificate showing the point of origin damage which will

be accepted and used by the railroads in processing his claim. Section 20(11) does not prohibit the railroads from making reasonable rules and regulations designed to protect them from being held liable for such damage. The tariff provisions simply provide a reasonable and practical means of eliminating from claims for loss and damage that portion which is not caused by the railroads. There is no attempt to limit liability for damage caused by the railroads.

B. The Tolerance for Damage During Transportation Due to the Inherent Nature of Shell Eggs Is Not Prohibited by Section 20(11).

That an egg is regarded as a fragile commodity and very susceptible to shell damage in conclusively established by the testimony of the witness from the United States Department of Agriculture (R. 335).

The record is also clear that there is a certain amount of damage to the eggs resulting solely during transportation because of the inherent nature of the shipment, for which the Commission approved a tolerance of 1 percent in those instances where the shipper exercised the tariff option of presenting a federal or state inspection certificate setting forth the amount of damage existing prior to the receipt of the consignment by the railroad. The record shows that the condition of a damaged egg never gets better, but always gets worse with handling. Not only is there a worsening during transportation of the condition of the eggs which were in a damaged condition at the time they were received by the railroads, but those eggs also cause damage to others which had been sound (R. 302, 303). At page 3 of the Department of Agriculture's Exhibit No. 22 (R. 1130) is set forth the results of studies made by it with respect to 115 carloads of eggs delivered on all parts of the east coast, the Gulf port cities, and the west coast (R. 354, 475). Included among them were 12 cars which went to New York City (R. 475). One study

was of the condition of these 115 carloads at point of origin and the other study was of the condition of the same 115 carloads at destination after they had received rail transportation. The eggs were candled at both origin and destination (R. 474). The difference between the number of stains and dirties, checks and loss at origin, was found to be 1.7 percent (R. 31, 1130). The difference between the checked eggs at origin and at destination was 0.8 percent (R. 31, 473, 1130). The witness said that his study was supported by 8,000 additional cars, using the following language at page 475:

> "A. Fifteen cases to the car, a hundred eggs in each case, 115 cars supported by approximately 8,000 additional cars.
>
> "Q. These are all rail tests?
>
> "A. All rail tests."

It has also been contended by the appellants that the Commission made a basic error of law in holding that the susceptibility of eggs to damage is an inherent defect on the ground that the damage to the shell eggs results from an outside force applied by the railroads rather than from any tendency of the eggs to deteriorate spontaneously. It is respectfully submitted that, in order to be damage resulting from an inherent defect, it is not necessary that the damage would equally have occurred if the goods had not been carried at all. This principle is supported by the case of *Lister* v. *Lancashire & Yorkshire Railway Co.* [1903] 1 K. B. Div. 878. There the Railway Company contracted as a common carrier to carry for Lister an engine from his yard to a neighboring town on the railway. The engine was on wheels and fitted with shafts to allow its being drawn by horses. While the Railway Company was drawing the engine with its horses to the railway station one of the shafts, owing to its being rotten, broke. The horses took fright and upset the engine, which was damaged. The defective condition of the shaft was not known by either the plaintiff or de-

fendant and could not have been discovered by an ordinary examination. The county court judge was of the opinion that the Railway Company was liable and that the rule, that a common carrier is excused from liability for damage if it be caused by the inherent vice of the thing carried, is limited to cases in which the inherent vice itself directly causes the damage without any contributory act done by the carrier, as in the case of a vicious animal injuring itself, or overripe fruit becoming damaged by the pressure of its own weight. The appellate court, however, ruled to the contrary stating:

> "The county court judge, in thinking that the rule as to the non-liability of a common carrier for damage caused by an inherent defect in the thing carried was limited to cases in which the damage would equally have occurred if the thing had not been carried at all, in my opinion went much too far. When once you arrive at the fact that the thing is being carried in the ordinary way, and every precaution has been taken consistent with that mode of carriage, and the accident happens from the unfitness of the thing for that mode of carriage, the carrier is not responsible."

Also in point are *Leonard* v. *Pennsylvania R. Co.*, 15 F. Supp. 55, *Meltzer* v. *Pennsylvania R. Co.*, 29 F. Supp. 840, *Bronstein* v. *Baltimore & Ohio R. R.*, 29 F. Supp. 837, where the courts fixed tolerances for damage not caused by the railroads in connection with shipments of watermelons. Obviously, if the watermelons had been allowed to remain in the fields they would not have been damaged during the course of rail transportation, and there would have been no need for the court to have stated, as it did in the *Bronstein case*, "that when watermelons are loaded in bulk and transported by rail over long distances there will always be a certain amount of damage which cannot be avoided even by the most careful handling" and there would have been no need for the courts to have applied the tolerances which they did.

The damage during transportation is not caused by the railroads, but rather is due to the inherent nature of shell eggs. Section 20(11) of the Act does not prohibit the railroads from making reasonable rules and regulations designed to protect them from being held liable for such damage.

C. The Commission Has Administrative Jurisdiction Over Tariff Tolerance Rules and Has Consistently Interpreted the Interstate Commerce Act as Granting it that Authority.

For the past forty years the Commission has asserted its administrative jurisdiction over tariff rules providing tolerances for losses which are not caused by the railroads. It has done so in the face of the same contentions advanced here by the appellants. In *Crouch Grain Co. v. A. T. & S. F. Ry. Co.*, 36 I. C. C. 265, decided in 1915, the Commission approved the lawfulness of a tariff rule which provided that, in the adjustment of claims for loss of grain, allowances for natural shrinkage to be deducted from the claims should be ⅛ of 1 percent on wheat, flaxseed, rye, oats and barley, and ¼ of 1 percent on corn. In its second decision in that case, 41 I. C. C. 717, decided in 1916, the Commission answered the complainants' contentions that the allowances were unjust and unreasonable because (1) the carriers thereby sought to limit their liability in violation of the Act to regulate commerce; (2) it was in effect an arbitrary determination in advance by the carrier of a disputed question of fact; and (3) it amounted to the taking of property without due process of law. In response to the first contention, the Commission pointed out that there was no limitation against losses caused by the carrier, but rather that it was against liability for losses due to the inherent nature of the commodities themselves, and that there was no legal objection to a stipulation for exemption from liability for losses due to causes beyond the carrier's

control. In dealing with the second objection the Commission reviewed the contentions of the complainants that there is such a variation in the shrinkage of grain, depending on the time of year in which transported, the distance it moves, and the route of movement, that a carrier cannot tell, with any degree of certainty, how much shrinkage, if any, will occur on a given shipment, and that, therefore, for the carriers arbitrarily to fix in advance any stated amount to be deducted therefor in the adjustment of claims for loss and damage deprives the shipper of the right to a trial by jury of a disputed question of fact in contravention of Article 7 of the Constitution of the United States. The Commission rejected this contention and quoted from *Cardwell* v. *Union Pac. R. Co.*, 90 Kan. 707, 136 Pac. 244, wherein the court having a similar contention before it had held such tolerances were lawful and that it was not necessary that evidence be offered of the fact that there is shrinkage of wheat in transit, a fact "which seems to be so well known that the courts will take judicial notice of it." The court in the case cited further stated that "whether any such shrinkage occurred during a specific shipment could hardly be determined without assuming the absolute accuracy of the initial and receiving weights." As to the third objection that the effect of the provision in question was to take the property of the shipper without due process of law, the Commission stated that this was met by it by the decision in its original report to the effect that the rule assailed was not shown to be unreasonable. The finding in the original report to which the Commission refers appears at page 267 thereof and reads as follows:

> "Defendants admit that the shrinkage is not uniform, but insist that their rules for calculating it are both practicable and reasonable. The loss is invisible, and in *Baltimore Chamber of Commerce* v. *P. R. R. Co.*, 15 I. C. C. 341, we recognized the im-

possibility of absolute precision in a fixed schedule of deductions intended to meet varying conditions, although the subject was there involved within narrower limits than here. The record indicates that the deductions in question were fairly conservative, and upon all of the facts disclosed we find that the rule assailed is not shown to be unreasonable."

In *National Poultry Butter & Egg Assn.* v. *N. Y. Central R.R. Co.*, 52 I. C. C. 47, decided January 21, 1919; or over 36 years ago, the Commission was called upon to pass upon the lawfulness of loss and damage rules in connection with shipments of shell eggs. In doing so, the Commission said at page 57 of its report that it had no jurisdiction over damage claims, as such, but that it did have jurisdiction over practices of carriers and tariff rules. It considered and approved a tolerance rule of 5 percent in connection with eggs which were known as current receipts or current receipts rehandled, which had been in effect since at least February 15, 1916, or almost 40 years ago. This settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons—*United States* v. *Chicago, North Shore R. Co.*, 288 U. S. 1, at page 13. This is particularly so when it is borne in mind that at the time of the decision in the *National Poultry, Butter & Egg Assn. case*, and of the second decision in the *Crouch Grain Co. case*, in both of which cases tolerances were approved, the so-called second Cummins Amendment (Act of August 9, 1916—39 Stat. 441) was in effect and contained the prohibitions against limitations of liability upon which the appellants now rely under Section 20(11) of the Interstate Commerce Act of which the second Cummins Amendment forms a part. This view is supported by *New Haven R.R.* v. *Interstate Commerce Commission*, 200 U. S. 361, where the court conceded the binding effect of decisions of the Commission which had been "adhered to by that body during

the many years which have followed", saying at pages 401-402:

> "We make this concession, because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with."

This is particularly true in the instant case. Congress has exhibited an almost parental concern for Section 20(11), revising it frequently, and particularly when it has detected anything viewed as an erroneous interpretation by the Interstate Commerce Commission. For example, only 18 months after enactment of the first Cummins Amendment (Act of March 4, 1915, 38 Stat. 1196), Section 20(11) was revised because the "construction put upon the [Cummins] proviso by the Interstate Commerce Commission has resulted in some vexatious requirements insisted upon by carriers and in some injustice. * * *" *Sen. Rep. No. 394*, 64th Cong., 1st Sess. 2 (1916). This change in the Cummins Amendment was enacted on August 9, 1916 (39 Stat. 441). The Commission had decided the first *Crouch Grain* case, *supra*, only ten months earlier, on October 5, 1915. Congress must have been

aware of this decision,* but it saw no need to countermand the Interstate Commerce Commission's interpretation.

The Cummins Amendment was revised again on February 28, 1920 (41 Stat. 494) "* * * so as to make it clear that where loss, damage, or injury occurs where the property is in the custody of the carrier by water the liability is to be determined by the law applicable to transportation by water, which confines liability to the value of the vessel and the freight money." *H.R. Rep. No. 456*, 66th Cong., 1st Sess. 31 (1919). A second 1920 revision also clarified the Cummins Amendment, in so far as it concerned the two-year period for institution of suits against carriers (41 Stat. 494). The two clarifying amendments of 1920 were enacted approximately one year after the Commission's *National Poultry* decision, *supra*, on January 21, 1919, and after the substance of this decision had been reported to Congress.†

Section 20(11) was subsequently amended on five different occasions—in 1926 (44 Stat. 835), 1927 (44 Stat. 1448), 1930 (46 Stat. 251), 1935 (49 Stat. 543), and 1940 (54 Stat. 919).

The pertinent language of Section 20(11), which had been construed in both the *Crouch Grain* and *National Poultry* cases, remained intact throughout this constant legislative revision and clarification. Congressional acquiescence in the judicial or administrative interpretation of a statute is considered legislative intent at the time of enactment. 2 Sutherland, *Statutory Construction* § 5103-5109 (3d ed. Horack 1943). And, as Mr. Justice Roberts said in *Old Colony R. Co.* v. *Comm'r*, 284 U. S. 552, 557 (1931): "* * * The repeated reenactment of a

* Congress knew of the Interstate Commerce Commission's interpretation which led to the 1916 amendment, and was officially informed of the substance of the first *Crouch Grain* decision. 30 I. C. C. Ann. Rep. 132 (1916). Congress was also informed of the substance of the second *Crouch Grain* decision. 31 I. C. C. Ann. Rep. 116 (1917).

† 33 I. C. C. Ann. Rep. 103-104 (1919).

statute without substantial change may amount to an implied legislative approval of a construction placed upon it by executive officers. * * *" Mr. Justice Stone used similar language: "* * * The reenactment of a statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed. * * *" *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492-493 (1931).

The mathematical and unrealistic interpretation of Section 20(11) urged by the appellants has long and consistently been rejected. It is respectfully submitted that this settled administrative construction of the statute to the effect that the Commission's jurisdiction over such tolerances has not been destroyed by the provisions of Section 20(11) of the Act is persuasive that the Commission has that jurisdiction and that such tolerances are not unlawful.

II.

The Regulations Are Just and Reasonable and the Commission's Approval of Them is Supported by the Record and Adequate Findings.

Loss and damage claims involving shell eggs have been a problem for almost half a century. By the time the Commission instituted the investigation which resulted in this proceeding the situation had become an intolerable one which demanded a remedy.

In *New York Mercantile Exchange* v. *B. & O. R. R. Co.*, 36 I. C. C. 156, decided October 4, 1915, the matter was brought to the Commission's attention by a complaint contending that the tariff rules then applicable to shell eggs were unlawful. It was contended (page 158) that the rules operated "to make the collection of claims for loss and damage more difficult" in New York

than in other cities. The report noted (page 159) that dishonest practices had served to swell loss and damage claims improperly. Following an investigation by the Commission and criminal prosecution of certain of those involved, a revised rule had been established by the railroads permitting inspection for damage to shell eggs only of the cases showing external evidence of damage. The enforcement of that rule had been enjoined by the United States District Court for the Southern District of New York "unless and until said rule and regulation has been filed with the Interstate Commerce Commission." The rules were filed with the Commission and became effective December 23, 1913. Their lawfulness was challenged in the cited case.

The Commission noted (page 161) that the rule there under consideration simply required the consignees to receipt for cases of eggs in the same terms as the carrier receipted for them when offered for shipment wherever external evidence of damage was absent, and that it was not unjust or unreasonable.

In *National Poultry, Butter & Egg Asso.* v. *N. Y. Central R. R. Co., supra,* decided January 21, 1919, the Commission was again called upon to pass upon the lawfulness of tariff rules applicable to loss and damage claims covering rail shipments of shell eggs. In that proceeding it found a 5 percent tolerance rule there under consideration reasonable when applied to current receipts or current receipts rehandled. The report indicated (page 49) that the 5 percent rule was based upon the assumption that shippers ordinarily packed approximately 18 broken or damaged eggs into cases of 30 dozen eggs, and that it was practically admitted by the complainants that it would be reasonable to continue to apply that tolerance to shipments of current receipts or rehandled current receipts.

In its report in the *New York Mercantile case,* at pages 160-161, the Commission said:

"Even if conditions of time, space, and cost permitted a complete examination of the contents of all cases upon delivery, or if an inspection of a certain number of cases in each consignment could be relied upon to disclose a fair average of the total damage, the difficulty as to the ascertainment of the carrier's liability would not be met, unless and until it was shown what the condition of the contents of the cases was when offered for shipment. While it is abundantly shown of record that the total damage disclosed by full examination is far in excess of that existing in those cases showing external evidence of damage, it is also proved that many damaged eggs are ordinarily contained in the cases when offered for shipment."

In its report in the *National Poultry case* the Commission stated (page 61) that nothing contained in that report "precludes the carriers, by appropriate tariff rule, from requiring a disclosure by shippers of the condition of the shipments when offered for transportation".

The complainants in the *New York Mercantile case* suggested that the carrier be required to ascertain the condition of the contents of egg cases at point of origin, but the Commission stated that was clearly impossible and refused to impose that requirement. In the case at bar traffic witness Schilt for the United States Department of Agriculture offered such an inspection *by the railroads* as the only solution of the present problem (R. 679, 680). That solution is just as "clearly impossible" today as it was in 1915 when the Commission refused to adopt it. As the only practical alternative, the railroads have provided the present regulations which give the shipper the option of offering a federal or state inspection certificate establishing the exact amount of damage existing at the time a shipment is offered for transportation. When the shipper elects not to take

advantage of that opportunity, the tolerances offer the only practical and lawful alternative.

The situation had become so serious in recent years that the Commission instituted an investigation on its own motion. A large number of witnesses presented evidence for its consideration, including representatives of the United States Department of Agriculture, the United States Army, the egg trade, and the railroads, and a large and voluminous record was made. The problem was pinpointed and examined in a very thorough investigation. The determination of the average shell damage existing in rail shipments of eggs at the time they are tendered to and accepted by the railroads for transportation was conclusively proved, as was the in-transit damage attributable to the inherent nature of the commodity. The Commission had the benefit of briefs and oral argument. With all that before it the Commission, as an administrative body of experts, painstakingly prepared a report in which it unanimously determined the rules and regulations here assailed were just, reasonable, and otherwise lawful, and the lower court has upheld the lawfulness of the order issued by the Commission based upon its investigation and report. The Commission's determination of the normal expectancy of breakage not caused by the railroads was not an incident such as it would be in a proceeding to recover damages in a court of law; it was the precise issue upon which the hearings were focused, and upon which the Commission exercised its judgment.

Section 1 of the Interstate Commerce Act requires the railroads to establish just and reasonable regulations with respect to the receipt of freight. Section 2 prohibits unjust discrimination, and Section 3 undue preference and prejudice. Section 6 requires the publication of rates, rules and regulations, and provides that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified." Section 15 of the Act charges the Commission with the duty of

seeing that the regulations and practices of the railroads are just, fair and reasonable. It was in conformity with that statutory mandate that the Commission conducted its investigation and undertook to fulfill its duty under the law.

There was and is no possibility of resolving this difficulty as though it were a mathematical problem to which there could only be one answer. It calls for the exercise of an informed judgment. There is no one or any body that is better qualified to determine the normal expectancy of breakage for which the railroads are not responsible than the Interstate Commerce Commission. It is an administrative tribunal appointed by law and informed by experience. (*Illinois Central R. Co.* v. *I. C. C.*, 206 U. S. 441). It is a body of experts with a national vision (*Wallower* v. *U. S.*, 32 F. 2d 524, 530).

There is nothing unique in providing a tolerance for the normal expectancy of shell damage to eggs. Tolerances have been adopted by the United States Department of Agriculture, along with the trade, in grading eggs. For example, the tolerances on AA grade is 7½ percent and on A grade 11.7 percent, (R. 342). Likewise, the Army of the United States allows tolerances in connection with its purchases of shell eggs. On shell eggs for export a 5 percent tolerance is permitted which "can be stains, checks, leakers, broken eggs, and loss." On eggs not for export a 10 percent tolerance is permitted (R. 406).

The appellants urge that there might be instances in which shipments destroyed by carrier negligence contained less than the percentages of damage not caused by the railroads found reasonable by the Commission, and, therefore, that the regulations are unlawful because of the provisions of Section 20 of the Act to the effect that the railroads shall be liable "for the full actual loss, damage, or injury to such property" caused by them. Such a narrow construction of one portion of the Interstate Commerce Act renders impotent the other provisions of the

Act, whereas the interpretation placed upon the Act by the Commission gives a practical interpretation of Section 20(11) and still retains the beneficial consequences of the regulations which are demanded by other provisions of the Act. The railroads submit that the interpretation of a portion of the statute in conjunction with the other portions thereof is supported by the following remarks set forth in *Arkansas Fertilizer Co.* v. *United States*, 193 Fed. 667, at page 670:

> "In construing remedial statutes, especially those of a generic character, courts have not hesitated to restrict and modify the ordinary meaning of words and phrases, and even of entire paragraphs, in order to harmonize conflicting or inconsistent provisions and so enable all of them to contribute in proper degree to the object sought to be accomplished. Instances of this kind are too familiar to require citation. Indeed, the Supreme Court, in the Abilene Case, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, declared that a right of action as old as the common law had been taken away by the act to regulate commerce, since otherwise full effect could not be given to the purpose of that statute to prevent discriminations."

Since the letter of the law refuses to hold common carriers liable for damage to the lading which existed prior to the time that the lading was received by the carriers, and for damage occurring during the course of transportation due to the nature of the goods themselves, some question might be asked as to the need for the tolerances approved by the Commission and now established in the tariffs. The answer is to be found in the practical considerations in the application of the law. The uniform bill of lading recites that the property received for transportation is "in apparent good order, except as noted (contents and condition of contents of packages unknown), * * *." In *Isdaver* v. *Philadelphia & Reading Ry. Co.*, 54 Pa. Super. 509, it was stated that the quoted matter

"* * * is an admission as to conditions visible and open to inspection, but does not bind the carrier to liability for the contents in the absence of evidence that the package is not what it appears or is represented to be. The admission applies to external conditions but not to that which is not open to inspection. The responsibility of the carrier in a case like this is only to deliver the goods as he receives them."

To the same effect is *Orunsten* v. *New York Central R. Co.*, 165 N. Y. Supp. 997. The following appears at page 998:

"Where the shipper loads the goods, and the common carrier merely issues the uniform bill of lading, without making any special examination, the mere formal declaration of the bill of lading that the goods were received in apparent good order does not call upon the defendant to establish the contrary, nor to assume the burden of showing its freedom from negligence. The evidence of the actual condition of the goods was presumptively known to the shipper, and it must have been available to the plaintiff, and, before he can call upon the defendant to show freedom from negligence, he must show that the conditions existed which fairly gave rise to an inference of such neglect."

It is submitted that these cases correctly state the law.

In the face of what is stated above it would appear at first blush that the railroads are amply protected in suits instituted to recover claims for alleged damage to shell eggs in that the burden is upon the claimant to prove that the eggs were not broken or in otherwise damaged condition when they were received by the railroads for transportation. However, it is a relatively easy matter for a shipper to overcome this difficulty. He need only offer testimony that the eggs were carefully packed, that only sound eggs were placed in the crates, and that the fillers

and flats were such as to protect the eggs during the course of packing. If a movement to the railroad freight station was involved it would only be necessary to produce testimony that the crates were carefully handled and not subjected to rough treatment during the course of that transportation. Having thus established a *prima facie* case, the burden would be upon the railroad to show that the loss, or at least part of it, resulted from an excepted cause —*Galveston, H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481, 492. If the railroad should introduce expert testimony to prove that it is humanly impossible to pack and move a crate of eggs without some breakage, as this record before the Commission establishes, the question of how much that breakage is would be left to the jury or to the court if the case should be tried without a jury. Thus, as a practical matter, the railroads are in a vulnerable position in proceedings before the courts to recover claims for alleged damage to shell eggs. At best the question of the amount of damage in the crates at the time they are received for transportation, and the amount which occurs during rail transportation due to the fragile nature of the eggs—the evidence before the Commission establishes conclusively that there always is some damage—is left to the jury hearing the case. Individual juries will differ in their conclusions and this will result in a lack of uniformity and discrimination. The regulations providing uniform deductions for damage not caused by the railroads would eliminate this. There is a necessity for the regulations and this fact is particularly pertinent for Section 1(6) of the Interstate Commerce Act dealing with the duty of common carriers specifically requires them to establish just and reasonable regulations and practices "relating to or connected with the receiving, handling, transporting, storing, and delivery of property * * * which may be *necessary* or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms * * *." (Italics inserted.)

The appellants cite *Chicago, M. St. P. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97. In that case the court held unlawful a provision in the bill of lading that claims for loss or damage should be settled on the basis of the value of the property at the time and place of shipment, on the ground that it was a limitation of liability prohibited by the Cummins Amendment. The circumstances incident to the situation there were so different from those involved in the case at bar that the railroads respectfully submit that it is not in point. There was no question in that case but that the carrier caused the damage. The issue before the court was whether a provision in the bill of lading fixing the measure of damages to be paid on the origin value, rather than on the destination value, was lawful. Here there is no issue as to the value to be used. The issue is whether tariff provisions dealing with loss or damage not caused by the railroads are lawful. The purpose of the regulations here is not to give the contractee any less than what he would have had if the contract had been performed, but rather to see that he gets no more than he would have gotten if the contract had been performed. The intention of the regulations is to remove from a damage claim that portion of the damage for which the railroads are not liable. Their purpose is to introduce certainty so far as it is possible and practical to do so. Obviously the time to determine the damage existing in a consignment of shell eggs when it is tendered to the railroads for transportation is at that time and not after. The regulations afford the shippers the opportunity of doing this.

The case of *Toker Co.* v. *Lehigh Valley R. Co.*, 12 N. J. 608, 97 A. 2d 598, is also cited by the appellants. The statement therein upon which they rely is incomplete and, therefore, inadequate for general application. The situations there and here are substantially different. In the cited case the Interstate Commerce Commission had prescribed a certain weight tolerance for "water allowance"

to be used in the computation of transportation charges on shipments of coal. The Railroad Company insisted upon using this tolerance in settling claims for loss of lading. In the case at bar the very purpose of the Commission's investigation, and of its report and order, was to eliminate from damage claims that damage not caused by the railroads. The computation of the transportation charges is not involved. Moreover, the opportunity afforded the shipper in the present case to submit a certificate showing the damage prior to the receipt for rail transportation is something which could not have been afforded the shipper in connection with the situation involved in the *Toker case*.

The regulations would avoid a multiplicity of suits and a variety of decisions. They would decide the question once and for all except as the Commission might change the regulations from time to time to meet changed conditions. They provide a uniform method of removing from damage claims that breakage which is not caused by the railroads and for which they are not responsible. One of the very purposes for the creation of the Interstate Commerce Commission was to establish uniformity in connection with transportation so far as it is possible to do so—*New Haven R.R.* v. *Interstate Commerce Commission, supra,* at page 391. The regulations are in conformity with that purpose. They will promote the elimination of unjust discrimination which is the primary purpose of the Interstate Commerce Act and the Commission created by it—*United States* v. *Louisville & Nashville R.R.*, 235 U. S. 314, 320. They will aid in preventing involuntary rebates which will result if the breakage not caused by the railroads is not eliminated from the damage claims. This court has held that it is the duty of the courts to aid the railroads in resisting the payment of involuntary rebates—*Louden* v. *Simonds, etc. Grain Co.*, 306 U. S. 516, 521.

The claim situation in connection with shell eggs, in so far as it relates to damage existing at the time shipments are offered for transportation and the in-transit damage attributable to the inherent nature of the commodity, demands a remedy. The regulations provide it. They provide a method which is logical and desirable, and the only practical one. It is respectfully submitted that the law must take into consideration the interests of a practical and reasonable administration of the Commission's regulatory duties and the necessities of an intolerable situation. A condemnation of these regulations would make possible the continuance of the very things which the Interstate Commerce Act is intended to eliminate.

The appellants argue that the Commission's report and order are unjust and unreasonable, and not supported by adequate findings or substantial evidence on the record as a whole. They contend that there is no basis in the record for the approval of nation-wide tolerances; that the inspection at origin is substantially different from that at destination; that the Commission's conclusions as to the damage resulting from the "inherent vice" is supported by no adequate finding or evidence, and is directly contrary to its finding on the same subject in 1919; and that there is no warrant for different tolerances for eggs packed at rail origins and those packed at points other than rail origins.

There is no substance to any of these contentions. What the appellants are really doing is challenging the judgment of the Commission, rather than the basis for its findings of fact, although the law is clear that in matters of judgment the decision of the Commission is conclusive.

At pages 20 to 26 of this brief, portions of the evidence before the Commission have been reproduced. Much of it came from the United States Department of Agriculture itself. That evidence shows that there is preexisting shell damage in every shipment of eggs offered for rail

transportation, that an additional amount of damage is sure to occur during transportation because of the inherent nature of the commodity. This damage which is not caused by the railroads exists irrespective of where the eggs may originate or where they may be delivered. In its decision the Commission carefully reviewed that evidence (R. 31). The Commission then found as follows (R. 32):

> "It also establishes that there is a normal expectancy of shell damage in every car loaded with eggs, and that it is at least impractical to load a perfect car.
>
> "Studies submitted by respondents in respect of inspections made by them of shipments of eggs at point of origin indicate that there is shell damage in every car, irrespective of whether the eggs are handled and repacked at rail point of shipment or are trucked to that point."

Notwithstanding the above mentioned evidence and Commission findings, the appellants contend that the sharp difference between claims on the eastern seaboard and elsewhere, and the fact that similar claims are negligible for eggs transported by truck, argue against nation-wide tolerances. But the damage not caused by the railroads exists irrespective of the destination of the shipment. It is the potential basis for an inflated claim. If claims are filed primarily by eastern receivers, it is obvious that a nation-wide tolerance cannot hurt receivers in other parts of the country who do not file similar claims. The fact that it may not be the universal practice of receivers to file claims for damage in connection with truck shipments is immaterial. The record shows that there is substantial damage in rail shipments for which the railroads are not responsible. The Commission made the necessary findings, supported by abundant evidence, to substantiate the justness and reasonableness of the nation-wide tolerances.

The appellants urge that the inspection at destination is "less exacting than the inspection by the packer at the origin", and that "it would seem necessary to follow that at least the percentage of damage escaping detection at the point of origin is overlooked at the destination." This is wholly beside the point and begs the real question. If there is damage existing in a shipment of eggs at the time it is tendered for rail transportation, the railroads have an absolute right to have the amount thereof determined by one means or other in order to protect themselves against claims for liability for that damage for which they are not liable. The shipper has an opportunity to have that damage determined and recognized through the medium of a federal or state egg inspection certificate. If there is no inspection at rail point of origin, there is no way for the railroads to know how many eggs have been damaged before they receive them. When inspection is made at destination it is a rigid one (R. 338). The Commission found that where the trouble is most prevalent the inspection "is being performed with a view to detecting all damaged eggs" (R. 34). The receiver may go through the entire case of eggs to find as many damaged eggs as he possibly can. That is up to him (R. 280). These circumstances establish that the Commission made an appropriate finding which was established by the evidence.

Another contention of the appellants is that the Commission's conclusion as to damage resulting from "inherent vice" is supported by no adequate finding or evidence, and is directly contrary to its findings in the *National Poultry* case, decided in 1919. That contention is not correct. Once more it will be found that the evidence of the Department of Agriculture's own witnesses, reproduced in this brief at pages 27 and 28, establishes the challenged fact. Witness Miller's testimony with respect to a 115-car study shows that the origin shell damage of 3.4 percent was found to be 5.1 percent at destina-

tion, or an increase of damage in transit of 1.7 percent. In making this test the same type of inspection was made at both ends. The Commission specifically dealt with this evidence in its report (R. 31), and found (R. 42):

> "Eggs containing checks, blind or visible, are to a certain extent in a damaged condition. In other words, the shells on those eggs are defective or cracked. These defects or cracks, unlike breaks or fractures in the bones of animate things, do not heal or knit with the passage of time. Any change in the condition of a defect or crack in an eggshell can result only in its enlargement, a healing or knitting thereof not being possible. The slightest movement in transportation may cause additional damage to such eggs. Such damage cannot be imputed to the negligence of the carrier but rather to the inherent nature of the commodity. Even a slight enlargement of the check or defective part could, by a rupture or break in the shell membrane, result in a leaking egg. Such an egg causes additional damage, such as stains, to otherwise sound eggs in the same case."

The inference that the Commission's judgment now must be wrong because it is somewhat at variance with what it said in the *National Poultry* case is clearly without merit. The *National Poultry* case was decided on the record before the Commission in that proceeding. The conclusions and findings of the Commisison in this proceeding are based on the record before it in this proceeding, as they of course had to be (*United States* v. *Abiline & So. Ry. Co.*, 265 U. S. 274, 288), since this was an entirely different proceeding and an entirely different record made thirty-five years later. There is clearly no merit to the contentions of the appellants with respect to that point.

The appellants argue that there is no warrant in the record for the approval of different tolerances on eggs

packed at rail origins and those packed at points other than rail origins. They argue that there is no evidence to support different tolerances. The record now before the Commission is replete with evidence that there is a substantial amount of shell damage in shipments of eggs moving from country points to packing plants, most of which are located at rail shipping points. For example, Witness Miller, testifying for the United States Department of Agriculture, stated that when eggs from the farm are delivered to the packer 5 percent of them are in a checked condition. Of that 5 percent, according to this witness, 4 percent existed at the time the eggs left the farm and 1 percent more became checked while travelling to the packer's plant. In addition to that 5 percent, 12 percent more also showed shell damage consisting of stains and dirties. Witness Miller stated that the eggs reworked at the packer's plant left the shipping plant with a total of 3.3 percent damage. He reaffirmed that testimony at a subsequent hearing as a result of further tests he had made (R. 365, 371, 472-473). Indeed, in the *National Poultry* case the Commission found reasonable a 5 percent tolerance on current receipts or current receipts rehandled, current receipts being eggs which came directly from the producer or country merchant.

Contrary to the contentions of the appellants, there is ample evidence in the record to support the judgment of the Commission that the different tolerances are warranted for eggs packed at rail points of origin and for those packed at other than rail points of origin.

The railroads respectfully submit that the Commission had substantial evidence before it, made the findings of fact necessary to support its conclusions, and that those conclusions are not in any way in violation of law. The Commission is not compelled to annotate to each finding the evidence supporting it—*United States* v. *Pierce Auto Lines*, 327 U. S. 515, 529. The law in such circumstances is clearly set forth in *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, where the following appears at pages 270-271:

"The objections as presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions. It was urged that these are inconsistent with conclusions reached by it in similar cases, that the findings are inconsistent with some views expressed in its reports in this proceeding, that some evidence was improperly considered, and that inferences drawn from some of the evidence were unwarranted. These objections we have no occasion to discuss. The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. Skinner & Eddy Corporation *v.* United States, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772; New England Divisions Case, 261 U. S. 184, 204, 43 S. Ct. 270, 67 L. Ed. 605."

To the same effect are *Illinois Central R. Co.* v. *Interstate Commerce Commission*, *supra*, at page 466; *Virginian Ry.* v. *United States*, 272 U. S. 658, 663, and *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 691.

CONCLUSION.

The Interstate Commerce Commission, upon its own motion, has investigated the intolerable situation created by damage claims for shipments of shell eggs. It has held extensive hearings incorporated in a voluminous record. That record has been analyzed and contentions based upon it have been presented not only to the full Commission which has unanimously reached the conclu-

sions assailed in this proceeding, but those conclusions have been tested and approved by the court below, after further briefs and arguments. It is respectfully submitted that the decision below was correct and that it should be affirmed.

Respectfully submitted,

J. Edgar McDonald,
William F. Zearfaus,
Attorneys for Intervening Railroads,
Appellees.

September 22, 1955

APPENDIX A.

Excerpts from the Interstate Commerce Act
(49 U. S. C. A.).

Section 1 (6):

"It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Section 6 (1):

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been estab-

lished, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Section 13 (2):

"Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the

provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide."

Section 15 (1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and

what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed:"

Section 20 (11):

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States

to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Com-

merce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And*

provided further, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided."

APPENDIX B.

DAIRY PRODUCTS:

Eggs, noibn, see Notes 5, items 14560-A to 14589 and 6, item 14590:

In packages complying with specifications for package 512 or 893, see Notes 7, 8, 9 and 10, incl., items 14595, 14600, 14601 and 14602.

In packages not complying with specifications for package 512 or 893, or not complying with requirements of Notes 8 and 9, items 14600 and 14601, see Note 10, item 14602.

Note 5.—Special regulations governing descriptions, marks, inspection and delivery of eggs, and the handling of claims thereunder.

Section 1.—Shippers of eggs must place the following information on shipping order and bill of lading:

(a) Total number of packages.

(b) Type of package (wooden or fibreboard) and number of each type and capacity.

(c) Number of packages that do not contain full number of eggs for which the package is intended, and the actual extent of such shortage.

(d) Number of packages entirely containing checked, cracked, stained or dirty eggs.

Section 2.—Upon arrival of shipment at point of delivery, the consignee or his authorized representative shall have the privilege of opening each package, at no expense to the carrier (see Section 8), and of initially examining the contents thereof; provided, however, on notice by the carrier, such initial examination shall be in the presence of the carrier's representative. If any package contains eggs having

shell damage for which the carriers may be deemed responsible, the contents of such package shall be jointly inspected by the consignee and the carrier, or their authorized representatives. Any damage to the eggs shall be jointly recorded by the consignee and the carrier, or their authorized representatives, and such joint record shall be conclusive as to the nature and extent of damage.

Section 3.—The examination by consignee and joint inspection by consignee and carrier, provided for in Section 2 of this Note, shall be made before the shipment is removed from carrier's possession, except where the carrier agrees that the joint examination, or both the examination and joint inspection, may be made elsewhere and within a specific period of time after actual delivery of the shipment by the carrier into possession of consignee or his designated agent. The carrier shall have the right to place identifying marks upon any package to be inspected.

Section 4.—Upon the discovery of eggs deteriorated by heat, cold or wet in any shipment, not later than twenty-four (24) hours after delivery, the consignee shall be entitled to a joint inspection of the entire contents of the shipment to determine the damage from such causes.

Section 5.—On consignments of eggs where order bills of lading are indorsed to allow inspection, such inspection will be permitted only for the purpose of ascertaining the quality or grade of the contents of the packages.

Section 6. On eggs placed in packages at rail point of origin of the shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 3% of the contents of the packages containing damaged eggs. Where damage exceeds

3%, claims shall be allowed for all damage in excess of 3%, if investigation develops carrier liability.

Exception.—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 2%, the percentage of actual damage as shown on such certificates, plus 1%, shall be used in lieu of 3% specified in this Section.

Section 7.—On eggs placed in packages at points other than the rail point of origin, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 5% of the contents of the packages containing damaged eggs. Where damage exceeds 5% claims shall be allowed in excess of 5%, if investigation develops carrier liability.

Exception.—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 4%, the percentage of actual damage as shown on such certificates, plus 1%, shall be used in lieu of 5% specified in this Section.

Section 8.—No expense incurred by consignee in the ascertainment of damage will be allowed. In case of carrier liability, actual and necessary charges incurred for labor and material, as verified by carrier representative, in reconditioning each package in which verified damage exceeds the percentages stated or otherwise provided for in Section 6 or Section 7 of this Note, whichever is applicable, shall be borne by the carrier. If, by reconditioning any damaged package or contents, there shall result an enhanced value because of such reconditioning of such package

or contents, such increased value shall be credited to the claim.

Section 9.—Where the application of percentages stated or otherwise provided for in Section 6 or Section 7 of this Note result in fractions of one egg, such fractions shall be increased to the next whole number.